(1) Supreme Court, U.S.
FILED

No. 00 682 OCT 30 2000

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In the Supreme Court of the United States

JACOBY WALKER, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may find that a criminal defendant participated in a particular conspiracy solely on the basis of the defendant's membership in a different conspiracy that had dealings with the conspiracy in question.

2. Whether a criminal defendant may be subject to a sentence enhancement for obstruction of justice when neither the district court nor the court of appeals made any finding that the defendant's allegedly false statements were material or willful.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jacoby Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a, *infra*) is reported at 213 F.3d 409. The judgment of the district court is unreported.

JURISDICTION

The judgment of the court of appeals affirming petitioner's conviction and sentence was entered on May 23, 2000. Pet. App. 20a-21a, *infra*. Petitioner's petition for rehearing and for rehearing *en banc* in the court of appeals was denied on June 30, 2000. Pet. App. 22a-23a, *infra*. On September 7, 2000, Justice Stevens extended the time for filing the petition for certiorari to and including October 30, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF THE SENTENCING GUIDELINES INVOLVED

Relevant provisions of U.S.S.G. § 3C1.1 are reproduced at Pet. App. 24a-26a, *infra*.

STATEMENT

Petitioner Jacoby Walker is serving a prison sentence of life plus thirty years following his conviction on federal drug and firearm charges. In affirming petitioner's conviction and sentence, the court of appeals applied dangerously over-expansive views of both the federal law of conspiracy and the Sentencing Guidelines' provision regarding obstruction of

justice. This Court should grant review in order to resolve serious and intolerable confusion in the lower courts in these important areas of federal criminal law—a confusion that results in non-violent offenders such as petitioner serving draconian sentences on the basis of principles that conflict with the governing law as articulated by this Court.

1. The Government's Trial Evidence

a. Petitioner was tried in the United States District Court for the Northern District of Indiana for allegedly violating federal drug and firearm laws. Petitioner went to trial with two codefendants, Michael Mason and Mason's girlfriend, Monique Linear. The government's theory was that beginning in 1993 or earlier, Mason was the "kingpin" of a drug distribution organization in Gary, Indiana, and that Mason had "delegated his authority to distribute cocaine" to "several people," including petitioner. Tr. 53.[1]

Although the government presented evidence that petitioner had sold drugs on two occasions, its evidence concerning petitioner's involvement in the alleged conspiracy and his place in any chain of command was inconsistent. Former members of the Mason organization, all testifying pursuant to plea agreements, claimed that Mason directed potential drug buyers to deal with petitioner and others (Tr. 411), that petitioner and others sometimes received drugs from other members of the organization (Tr. 414-415), that petitioner and others sometimes delivered drugs to Mason's crack houses (Tr. 521), and that petitioner sometimes provided drugs to other members of the organization. Tr. 518.

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[1] "Tr. __" refers to the transcript of petitioner's trial. "3/10/99 Sent. Tr. __" and "3/12/99 Sent. Tr. __" refer to the transcripts of petitioner's sentencing hearing.

b. Much of the government's evidence at trial did not concern the Mason conspiracy at all, but rather a different conspiracy run by a man named John Allen. The indictment naming petitioner charged a conspiracy only among members of the Mason organization. The government brought a separate prosecution, naming none of the alleged members of the Mason conspiracy, against Allen and his coconspirators. The government explained to the jury in its opening statement that these were two different organizations (*e.g.*, Tr. 48), and it argued consistently to the jury that the Mason conspiracy and the Allen conspiracy were distinct conspiracies. See, *e.g.*, Tr. 48, 52, 1238, 1240.

Allen and his organization functioned as wholesalers, buying drugs in very large quantities and reselling them to retail-level operations like the Mason organization. As the government told the jury in its closing argument, members of the Allen conspiracy "deal[t] with select people. They [were] not street dealers." Tr. 1240. On the other hand, "Michael Mason's organization went all the way to the streets." Tr. 1240. Allen was one of several sources of the drugs that Mason sold (Tr. 373), and Mason was just one of Allen's many customers. Tr. 625-627, 774-775, 921-922.

Inexplicably, the government's evidence concerning the Allen conspiracy was not limited to its drug sales to Mason. The government introduced extensive evidence—including a great deal of hearsay admitted under the exception for statements of coconspirators (Fed. R. Evid. 801(d)(2)(E))—about all aspects of the Allen organization, which was far more highly organized and much more dangerous than the Mason group. The government's evidence about the Allen conspiracy, which had nothing to do with the Mason conspiracy, included testimony about sales of vast amounts of cocaine to undercover informants and various other buyers besides Mason (Tr. 80-84, 178-180, 384, 625-627, 685, 774-775, 921-922); a network of

"stash houses" used to store the Allen organization's huge drug inventory (Tr. 95-96, 647-649, 929, 930); cars equipped with secret compartments for transporting drugs (Tr. 634, 657, 940); the sources of the Allen organization's drugs (Tr. 791, 926-927, 932, 1051-1052); the Allen organization's use of semiautomatic assault weapons (Tr. 779); and a scheme for laundering drug money that successfully deceived Allen's bank and his accountants (Tr. 952-953).

The government emphasized the sheer volume of drugs involved in the Allen conspiracy, presenting evidence that Allen purchased fifty kilograms of cocaine every month from just one of his sources (Tr. 791, 926-927), and evidence about one of Allen's several "stash houses," which received shipments of twenty and fifty kilograms of cocaine and stored a total of 200 kilograms of cocaine. Tr. 83-84, 180, 915-917, 928, 930-932. The most prominent feature of the government's evidence regarding the Allen conspiracy, which the government stressed during both its opening statement and its closing argument (see Tr. 51-52, 1281), was a police raid on an apartment where Allen stored cocaine. Tr. 84-85, 180-181, 651-653, 933-934, 1041-1046. Over objection, the district court admitted all thirty-one kilograms of the seized Allen cocaine into evidence—a pile of cocaine so large that it obstructed the jury's view of witnesses. Tr. 1054.

Although witnesses testified that Mason purchased some of his cocaine from the Allen organization, no evidence connected petitioner or any other alleged member of the Mason organization to the Allen conspiracy.

c. Following a five-day trial, the jury returned a verdict of guilty on all counts against petitioner, although the district court was forced to vacate one of the firearm counts as unsupported by any evidence at all.

2. Petitioner's Sentence

a. The district court sentenced petitioner under the Sentencing Guidelines to concurrent terms of life imprisonment for his convictions under 21 U.S.C. §§ 841(a)(1) (distribution of crack cocaine), 846 (conspiracy to possess with intent to distribute crack cocaine), and 861(a)(1) (use of a minor to distribute crack cocaine), which run concurrently with a ten-year sentence under 26 U.S.C. § 5861(d) for possessing an unregistered firearm. This life sentence is followed by a consecutive thirty-year sentence for petitioner's conviction under 18 U.S.C. § 924(c)(1) for allegedly carrying a silencer-equipped gun "during and in relation to" the charged drug conspiracy.[2]

In arriving at a life sentence under the Guidelines, the district court first assigned petitioner a base offense level of thirty-eight, using the total quantity of drugs involved in the Mason conspiracy. 3/12/99 Sent. Tr. 19; see U.S.S.G. § 2D1.1. The district court then applied a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1 (3/12/99 Sent. Tr. 19), and a three-level enhancement for an "[a]ggravating [r]ole" as a "manager or supervisor" of criminal activity under U.S.S.G. § 3B1.1(b). 3/12/99 Sent. Tr. 20. This adjusted offense level of forty-three, in conjunction with a criminal history category of III, required a life sentence. 3/12/99 Sent. Tr. 20; see U.S.S.G. Ch. 5, Pt. A.[3]

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[2] Petitioner's conviction under section 924(c)(1) depended entirely on the theory that he is criminally liable for his coconspirator's use of a firearm under the rule of *Pinkerton* v. *United States*, 328 U.S. 640 (1946). There was no evidence that petitioner himself ever used or carried any weapon in connection with the alleged conspiracy or was otherwise involved in any violent criminal activity. See Pet. App. 10a-11a, *infra*.

[3] On appeal, the government conceded that the district court had incorrectly calculated petitioner's criminal history category, although

b. One of the questions presented concerns the sentence enhancement for obstruction of justice. The district court applied this enhancement even though the Presentence Investigation Report ("PSR") had recommended no such enhancement for obstruction of justice (PSR 4, 5), and the government filed no objections to the report. The government raised the issue for the first time with an oral request at petitioner's sentencing. 3/10/99 Sent. Tr. 9-10. The basis for the government's request was petitioner's testimony at a suppression hearing held during petitioner's trial. 3/12/99 Sent. Tr. 8-9.

On the final day of trial, petitioner objected to testimony about statements that he made to federal agents after his arrest. Tr. 1143-1145. The district court held a suppression hearing at which petitioner testified that his requests for an attorney had been ignored and that he only made a statement to the agents because the agents were threatening his mother. Tr. 1153, 1156-1157. Two agents testified that they made no threats concerning petitioner's mother and that petitioner never asked for a lawyer. Tr. 1150, 1163-1164. The district court denied petitioner's motion, holding that it had been "waiv[ed]" under Federal Rule of Criminal Procedure 12(b)(3), which requires that a motion to suppress "be raised prior to trial." Tr. 1188; see Fed. R. Crim. P. 12(f) ("Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof"). The district court went on to say: "Even without that, however, I find that the statements were voluntarily made." Tr. 1188.

At petitioner's sentencing, the district court "adopt[ed] the Government's position" and assessed a two-level enhancement for obstruction of justice "based on the testimony of the agents, which the Court believed, contrasted with the defendant's

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that error, standing alone, had no effect on petitioner's sentence. See Pet. App. 15a, *infra*.

testimony, which the Court did not believe." 3/12/99 Sent. Tr. 19. The entirety of the district court's findings in support of the enhancement was "that the Defendant lied under oath at the suppression hearing claiming that he requested a lawyer." 3/12/99 Sent. Tr. 19.

3. Petitioner's Appeal

On appeal to the Seventh Circuit, petitioner contested his conviction and sentence on numerous grounds, two of which are relevant here: (i) petitioner argued that the district court erred in admitting extensive and highly prejudicial, yet irrelevant, evidence concerning the Allen conspiracy, and (ii) petitioner argued that the district court failed to make—and could not have made—the findings necessary to support its imposition of a sentence enhancement for obstruction of justice.

a. Petitioner argued before the court of appeals that because there was no evidence in the record that could show that petitioner was a member of the Allen conspiracy, it was error for the district court to admit against petitioner the government's extensive evidence regarding the Allen conspiracy. Much of the government's Allen conspiracy evidence was hearsay ostensibly admitted under the exception for statements of coconspirators. But because petitioner was not a member of the Allen conspiracy, hearsay statements by members of that conspiracy were not admissible against petitioner under Fed. R. Evid. 801(d)(2)(E). And *all* of the government's Allen conspiracy evidence (whether hearsay or not) was simply irrelevant to its case against petitioner, as there was no evidence tending to show that petitioner was a member of that conspiracy. To the contrary, the government's theory of its case, as it argued to the jury, was that petitioner was a member of the much more limited Mason conspiracy and not the much broader and more dangerous Allen conspiracy, which the government consistently distinguished from the Mason

organization in its jury arguments. See Pet. C.A. Br. 17-24; Pet. C.A. Reply Br. 5-11.

The court of appeals rejected these arguments, concluding that "[t]he government presented sufficient evidence to establish that Allen and Mason's organizations were linked and part of a single conspiracy." Pet. App. 9a, *infra*. In support of this conclusion, the court of appeals cited *no* evidence of any agreement by petitioner himself to participate in the Allen conspiracy (and no such evidence exists). Rather, the court of appeals recited evidence regarding, at most, the relationship and interactions between the two conspiracies or between the Allen conspiracy and Mason personally—including evidence that Mason purchased cocaine from Allen, occasionally on credit; that Allen employed Mason's girlfriend; and that Mason purchased pagers for his organization from Allen's legitimate pager business. *Ibid.* None of this evidence showed anything about any claimed involvement of petitioner in the Allen organization.

b. Petitioner also objected on appeal to the district court's imposition of a sentence enhancement for obstruction of justice. In *United States* v. *Dunnigan*, 507 U.S. 87, 94-95 (1993), this Court held that a district court may enhance a defendant's sentence for obstruction of justice only after "mak[ing] independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out"—*i.e.*, "giv[ing] false testimony concerning a material matter with the willful intent to provide false testimony." Petitioner argued that the district court's minimal finding that petitioner "had lied under oath" could not constitute the "independent finding" of the elements of perjury required by this Court in *Dunnigan*. See Pet. C.A. Br. 27-28; Pet. C.A. Reply Br. 13-14.[4]

[4] Petitioner further argued that even if the district court had attempted to make the required findings, it could not, as a matter of law, have

The court of appeals rejected petitioner's argument on these grounds (Pet. App. 13a, *infra*):

> After listening to the testimony, the district court found that . . . Walker lied under oath. Therefore, the obstruction of justice enhancement was not clearly erroneous. The district court believed the agents and determined that . . . Walker had lied under oath and therefore an obstruction of justice enhancement was properly made.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for the Court to decide two important questions of federal criminal law and to supply much-needed guidance for lower courts on the scope and limits of the federal law of conspiracy and on the findings required by this Court's decision in *Dunnigan* before a defendant's sentence may be enhanced for obstruction of justice.

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found that petitioner's testimony at the suppression hearing was material. The Sentencing Guidelines define a "material" statement as one that, "if believed, would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1 Application Note 6. Because the district court was required to, and did, deny petitioner's motion to suppress as untimely and "waived" under Rule 12 (see Tr. 1188), petitioner's testimony could not "tend to influence" the district court's ruling on the motion. His testimony was, therefore, necessarily immaterial. See Pet. C.A. Br. 27-29; Pet. C.A. Reply Br. 13-17. The court of appeals did not address this argument.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE EXTENT TO WHICH INTER-CONSPIRACY RELATIONS CAN BE USED TO SHOW A DEFENDANT'S PARTICIPATION IN A CRIMINAL CONSPIRACY.

The decision of the court of appeals in this case raises the important question whether evidence of a criminal defendant's participation in one conspiracy, combined with evidence linking that conspiracy to a separate conspiracy, is enough to establish the defendant's participation in the second conspiracy. This case presents an opportunity for this Court to establish clear limits in an area of law long thought to exemplify the "tendency of a principle to expand itself to the limit of its logic." *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (quoting Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS 51 (1921)).

In affirming the district court's decision to admit against petitioner the government's vast evidence concerning the Allen conspiracy, the court of appeals concluded that there was "sufficient evidence" connecting petitioner to the Allen conspiracy but never made any reference at all to evidence that petitioner himself entered into an agreement that reached as far as the Allen organization and its criminal activities. In fact, the record contains *no* evidence of any kind concerning a connection between petitioner and the Allen organization, whose members were indicted and tried in a separate prosecution. Instead, the court of appeals held that it was enough that the government presented evidence that "Allen and Mason's *organizations were linked* and part of a single conspiracy," and it cited only evidence of business dealings between the conspiracies themselves. Pet. App. 9a, *infra* (emphasis added). Thus, this case raises the critical issue whether a court may dispense with evidence regarding the scope of a criminal defendant's own agreement and may

instead find that the defendant is a member of a conspiracy solely on the basis of a finding that the defendant is a member of a *different* conspiracy that has itself conspired with the conspiracy in question.

1. The decision below is consistent with other opinions that take a similarly expansive view of conspiracy liability, agreeing that the government may rely on evidence of links between conspiracies themselves in order to show that a member of one conspiracy is also a member of any "linked" conspiracy. These courts have accordingly held that "if a person conspires with another knowing that the latter is conspiring with another person or persons to commit the same offense, he is guilty of conspiring with such other person or persons." *United States* v. *Martinez*, 877 F.2d 1480, 1482 (10th Cir. 1989); see also, *e.g.*, *United States* v. *Daily*, 921 F.2d 994, 1007 (10th Cir. 1990) ("of principal concern is whether the activities of alleged co-conspirators in one aspect of the charged scheme were necessary or advantageous to the success of the activities of co-conspirators in another aspect of the charged scheme, or the success of the venture as a whole"); *Coates* v. *United States*, 59 F.2d 173 (9th Cir. 1932) (holding that when the defendant conspired with two men, supplying money for their illicit still, and, unknown to the defendant, they conspired with a fourth person, who ran a second still also financed with the defendant's money, the defendant had unwittingly conspired with the fourth party).

However, the analysis of these cases and the court below is flatly inconsistent with other decisions recognizing that "[t]o join a conspiracy . . . is to join an agreement," and thus "[t]he scope of a conspiracy" is necessarily "determined by the scope of the agreement" that the defendant is alleged to have entered into. *United States* v. *Townsend*, 924 F.2d 1385, 1390, 1392 (7th Cir. 1991). Thus, courts have held that "[t]he essence of any conspiracy is . . . agreement, and 'in order to prove a single

conspiracy, the government must show that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal.'" *United States* v. *Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) (quoting *United States* v. *Martino*, 664 F.2d 860, 876 (2d Cir. 1981)); see also, *e.g.*, *United States* v. *Gibbs*, 182 F.3d 408, 422 (6th Cir.) ("Mere association with conspirators is not enough to establish participation in a conspiracy") (internal quotation marks omitted), cert. denied, 120 S. Ct. 592 (1999); *United States* v. *Papa*, 533 F.2d 815, 821-822 (2d Cir. 1976) (defendant's supervision of two unrelated drug distribution operations did not transform two separate conspiracies into one). According to the approach taken by these courts, the critical inquiry is always the scope of the individual defendant's own agreement to further criminal activity, and a court may not substitute for that inquiry evidence that the defendant is a member of an organization that itself entered into agreements with others to violate the law. See, *e.g.*, *United States* v. *Edwards*, 945 F.2d 1387, 1396 (7th Cir. 1991) ("conspiracy liability cannot exceed the scope of a defendant's agreement to further criminal activity").

The court should grant review to resolve the differences between these conflicting approaches to the federal law of conspiracy.

2. The latter view of criminal conspiracy—which insists on evidence of an individual defendant's agreement to further criminal activity—is undoubtedly correct.

Under the so-called *Pinkerton* rule, every member of a conspiracy can be held criminally liable for the actions of every other member. See *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1946). In light of this potentially very harsh rule, courts must distinguish carefully "between separate conspiracies, where certain parties are common to all and one overall

continuing conspiracy with various parties joining and terminating their relationship at different times." *United States* v. *Varelli*, 407 F.2d 735, 742 (7th Cir. 1969). In making this determination, each defendant's agreement "must be determined individually from what was proved as to him." *Id.* at 743; see also *ibid.* ("If, in Judge Learned Hand's well-known phrase, in order for a man to be held for joining others in a conspiracy, he 'must in some sense promote their venture himself, make it his own,' it becomes essential to determine just what he is promoting and making 'his own'") (citations omitted). Any other rule threatens to impose criminal liability for crimes that a defendant did not personally commit merely on the ground that they were committed by another member of a conspiracy which the defendant never agreed to join. Notions of justice and fair play do permit such a result, at least not without a very clear indication of legislative intent to expand criminal sanctions in such an unlikely manner.

Moreover, it is also critical, just as an evidentiary matter, to maintain clear lines between distinct conspiracies. Here, where the evidence concerning petitioner's alleged participation in the loosely organized Mason conspiracy was tenuous at best, there was a clear danger of unfair prejudice from the government's inflammatory evidence concerning the highly organized and extremely dangerous Allen conspiracy. Indeed, the government actively exploited its improper Allen conspiracy evidence, arguing to the jury that if the Mason organization under prosecution was not stopped, it would soon become as well-organized and threatening as the Allen conspiracy. See Pet. C.A. Br. 23. This Court has warned that where, as here, a trial court fails to take any "precaution to keep separate conspiracies separate," "[t]he dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." *Kotteakos* v. *United States*, 328 U.S. 750, 772, 774 (1946).

3. In light of the confusion among the lower courts and the unacceptable consequences of the court of appeals' holding, this Court should grant review to clarify this important and far-reaching area of federal criminal law. In recent years the number of conspiracy cases brought by federal prosecutors has rapidly increased. See Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 8 (1992) ("what we see today is nothing short of a miracle in terms of the number of conspiracy prosecutions. The charge can be found everywhere"). While conspiracy law always "is complicated and full of pitfalls for even an experienced trial judge" (*United States* v. *Lam Lek Chong*, 544 F.2d 58, 68 (2d Cir. 1976)), this case concerns an area that poses particular difficulties. Courts and commentators have noted the lack of much-needed clear principles to use in drawing lines between related conspiracies. See *id.* at 65 (discussing the "vexing problem of determining when . . . parallel groups of suppliers operating through a central figure can justifiably be found to be members of one single conspiracy, rather than of two or more separate conspiracies"); 5 Jack B. Weinstein, *et al.*, WEINSTEIN'S FEDERAL EVIDENCE § 801.33[5] (2d ed. 1999) (existence of multiple conspiracies is "a recurring problem in narcotics cases").

This deficiency in the state of the law is doubly problematic in light of the special risks of unfairness that conspiracy prosecutions pose. "Mass" conspiracy trials "call for use of every safeguard to individualize each defendant in relation to the mass." *Kotteakos*, 328 U.S. at 773. However, while the law of conspiracy has long been the "darling of the modern prosecutor's nursery" (*Harrison* v. *United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.)), this Court and the lower courts have continued to express grave concerns about its misuse and overuse as an indiscriminate "dragnet." See, *e.g.*,

Direct Sales Co. v. *United States*, 319 U.S. 703, 711 (1943) ("charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes"); *United States* v. *Martin*, 920 F.2d 345, 351 (6th Cir. 1990) (Jones, J., dissenting) ("I have a growing fear that casting a conspiracy net will become a catch-all method charging anyone caught in the vicinity of illegal drugs"). "The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid." *Krulewitch*, 336 U.S. at 446-448 (Jackson, J., concurring); see also, *e.g.*, *United States* v. *Martinez de Ortiz*, 883 F.2d 515, 524-525 (7th Cir. 1989) (Easterbrook, J., concurring) ("'Conspiracy' is a net in which prosecutors catch many little fish. We should not go out of our way to tighten the mesh."), vacated on other grounds, 897 F.2d 220 (1990); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 922, 922 (1959) (noting "serious danger of unfairness to the defendant" in conspiracy trials); J. Turner, KENNY'S OUTLINES OF CRIMINAL LAW ¶ 452 (19th ed. 1966) (quoting Fitzgerald, J., in the Irish State Trials of 1867) (conspiracy is a crime "'to be narrowly watched, to be jealously regarded, and never to be pressed beyond its true limits'"). These difficulties plaguing conspiracy law generally make review by this Court especially appropriate in this case.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE FINDINGS REQUIRED BY THIS COURT'S DECISION IN *DUNNIGAN* BEFORE IMPOSING A SENTENCE ENHANCEMENT FOR OBSTRUCTION OF JUSTICE.

In *United States* v. *Dunnigan*, 507 U.S. 87, 94-95 (1993), this Court held that before a district court may enhance a criminal defendant's sentence for obstruction of justice under

section 3C1.1 of the Sentencing Guidelines on the basis of untruthful testimony, the court "must review the evidence and make independent findings" of each of the elements of perjury, including (i) a false statement (ii) concerning a material matter, (iii) made willfully rather than as a result of confusion, mistake, or faulty memory. It is "preferable" for a district court "to address each element of the alleged perjury in a separate and clear finding," although it may be "sufficient" for the district court to make a different finding "that encompasses all of the factual predicates for a finding of perjury." *Id.* at 95.

According to the court below, this Court's mandate in *Dunnigan* was satisfied by the district court's bare finding that petitioner "lied under oath." This case presents an important opportunity for this Court to resolve a state of serious disarray in the lower courts and to clarify whether such a finding is sufficient under *Dunnigan*.

1. Despite this Court's attempt in *Dunnigan* to bring a measure of national uniformity to the application of the Sentencing Guidelines' obstruction of justice provision, there remains a "variety of approaches taken by the circuits" in reviewing sentence enhancements under section 3C1.1. *United States* v. *Massey*, 48 F.3d 1560, 1574 n.13 (10th Cir. 1995); Kevin J. Kelley, Note, *To Enhance or Not to Enhance: A Guide to Uniformity in Applying Perjury Enhancements Under Section 3C1.1 of the United States Sentencing Guidelines:* United States v. Dunnigan, 27 CREIGHTON L. REV. 585, 599 (1994) ("One of the greatest difficulties facing trial courts in determining whether to apply [a section 3C1.1] enhancement is ascertaining what factual findings are necessary to sustain a perjury enhancement"). The lower courts are in urgent "need [of] clarification" regarding the meaning of the language of section 3C1.1 and for "assistance in its application." *Massey*, 48 F.3d at 1574 n.13.

In reviewing district court decisions to enhance sentences under section 3C1.1, some courts of appeals have straightforwardly insisted upon a district court finding of all three of the "factual predicates for a finding of perjury" as contemplated by this Court in *Dunnigan*. See, *e.g.*, *United States* v. *Fiorelli*, 133 F.3d 218, 221-225 (3d Cir. 1998) (summarizing Third Circuit's stringent approach and remanding for more specific findings); *United States* v. *Buchannan*, 115 F.3d 445, 451 (7th Cir. 1997) (remanding for requisite findings); *United States* v. *Smith*, 62 F.3d 641, 646-647 (4th Cir. 1995) (remanding for resentencing where the district court "did not specifically find each of the three elements of perjury" and did not "make a single global finding that encompassed the three essential elements"). The Tenth Circuit has gone beyond the explicit requirements of *Dunnigan*, remanding for resentencing when district courts fail to "adequately identify the specific statements" they believe to be false. *United States* v. *Owens*, 70 F.3d 1118, 1132 (10th Cir. 1995); see also, *e.g.*, *Massey*, 48 F.3d at 1573 (noting that, "although *Dunnigan* did not require sentencing judges specifically to identify the perjurious statement, it has long been a requirement in the Tenth Circuit that the perjurious statement be identified, at least in substance").

In numerous other decisions, however, appellate panels have not required district courts to make factual findings with respect to all three elements of perjury. Thus, some courts have affirmed enhancements under section 3C1.1 even though the district court never found that the defendant's statement was material. See, *e.g.*, *United States* v. *Craig*, 178 F.3d 891, 901-902 (7th Cir. 1999); *United States* v. *Storm*, 36 F.3d 1289, 1295-1297 (5th Cir. 1994); *United States* v. *Matiz*, 14 F.3d 79, 83-84 (1st Cir. 1994); *United States* v. *Arias-Villanueva*, 998 F.2d 1491, 1512-1513 (9th Cir. 1993). Other courts have not required that district courts express any conclusion regarding the willfulness of the defendant's statement. See, *e.g.*, *United*

States v. *Lewis*, 115 F.3d 1531, 1537-1538 (11th Cir. 1997); *United States* v. *Woody*, 55 F.3d 1257, 1273 (7th Cir. 1995); *United States* v. *Castner*, 50 F.3d 1267, 1278-1279 (4th Cir. 1995). And still other decisions uphold obstruction of justice enhancements despite the absence of district court findings encompassing either materiality or willfulness. See, *e.g.*, *United States* v. *Cook*, 76 F.3d 596, 605-606 (4th Cir. 1996) (district court found only that defendant "had 'not testif[ied] truthfully at trial'" and that his testimony was "strained"); *United States* v. *Mustread*, 42 F.3d 1097, 1105-1106 (7th Cir. 1994) (district court found only that defendant "lied").

In many of these decisions, while the court of appeals did not demand that the district court itself make the findings required by *Dunnigan*, there was at least a finding by the court of appeals (one not authorized by anything this Court said in *Dunnigan*) that the materiality and willfulness elements of perjury were in fact satisfied. See, *e.g.*, *Matiz*, 14 F.3d at 84 ("we can make the determination of materiality on our own without remanding to the district court"). Other courts, however, have permitted a sentence enhancement under section 3C1.1 without even that much. Thus, for example, neither the district court nor the court of appeals in *United States* v. *Lang*, 81 F.3d 955 (10th Cir. 1996), even discussed the issue of materiality. See *id.* at 968-969 (concluding simply that defendants "knowingly lied on the witness stand during their trial"). Other decisions make no mention whatsoever of the element of willfulness. See, *e.g.*, *Craig*, 178 F.3d at 901-902; *United States* v. *Oplinger*, 150 F.3d 1061, 1070-1071 (9th Cir. 1998); *United States* v. *Dillard*, 43 F.3d 299, 308-309 (7th Cir. 1994); *United States* v. *Laury*, 985 F.2d 1293, 1307-1309 (5th Cir. 1993). And finally, there are decisions—like the one below—in which neither the district court nor the court of appeals makes any mention of either materiality or willfulness. See, *e.g.*, *United States* v. *Denetclaw*, 96 F.3d 454, 458 (10th Cir. 1996) (insisting that district court specifically identify

perjurious statements, but making no mention of the materiality or willfulness requirements); *United States* v. *Garin*, 103 F.3d 687, 689 (8th Cir. 1996) (enhancement for obstruction of justice not clearly erroneous where district court's finding that defendant "lied" was supported by the record); *United States* v. *Lowder*, 5 F.3d 467, 471-472 (10th Cir. 1993) (district court's determination "that portions of Defendant's testimony were untruthful" was "sufficient to establish specific instances of perjury and support an enhancement for obstruction of justice").

This widespread confusion among the lower courts regarding the proper application of such an important and widely used sentence enhancement and regarding the meaning of a decision of this Court is intolerable and warrants this Court's review.

2. By resting its affirmance of the enhancement of petitioner's sentence for obstruction of justice solely on a district court finding that petitioner "lied under oath," the court below completely ignored the analysis required by this Court's decision in *Dunnigan*, under which a district court must make findings of a false statement, willfulness, and materiality.

Neither the district court nor the court of appeals in this case "ma[de] findings" that could "support all the elements of a perjury violation." *Dunnigan*, 507 U.S. at 96-97. Although *Dunnigan* stated that it is only "preferable," not required, for district courts making this inquiry "to address each element of the alleged perjury in a separate and clear finding" (*id.* at 95), district courts are nonetheless obliged, at a minimum, to make a general finding that "encompasses all of the factual predicates for a finding of perjury." *Ibid.* Nothing even remotely resembling such an "independent" inquiry occurred in this case.

It is doubtful that the findings required by *Dunnigan* can properly be supplied in the first instance by a court of appeals.[5] Here, however, there has never been a judicial finding by any court that petitioner's allegedly false testimony at his suppression hearing was either material or willful, and *no court* has ever had occasion to consider petitioner's argument that this testimony was immaterial as a matter of law. See note 4, *supra*.

This Court has long recognized the critical importance of carefully evaluating allegedly perjurious testimony in the sentencing enhancement context. See *United States* v. *Grayson*, 438 U.S. 41, 55 (1978) (district judge must "evaluate carefully a defendant's testimony on the stand, to determine—with a consciousness of the frailty of human judgment—whether that testimony contained willful and material falsehoods"). But decisions like that of the court of appeals in this case render this Court's pronouncements in cases like *Grayson* and *Dunnigan* a dead letter. The sentence enhancement for obstruction of justice erroneously imposed on petitioner, merely because the district court thought that he "lied," aptly illustrates the confusion that permeates this area of the law and the loose treatment that lower courts have accorded this Court's opinion in *Dunnigan*. The Sentencing Commission has not acted to resolve this unacceptable state of affairs, and this Court should grant the petition to bring much-needed clarity to this significant area of federal sentencing law.

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[5] The fundamental problem with this approach is that "[w]ith only a cold, paper record before it, an appellate court is severely hindered in evaluating whether a defendant perjured himself at trial." *United States* v. *McDonald*, 935 F.2d 1212, 1219 (11th Cir. 1991). It is for good reason that the Sentencing Guidelines and this Court's decision in *Dunnigan* contemplate that the required fact-finding should be entrusted to the trial court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2000

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 99-1441, 99-1654 & 99-1720.

United States of America, Plaintiff-Appellee,

v.

Eric L. Frazier, Jacoby Walker and Michael Mason,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 2:97-CR-88—James T. Moody, *Judge*

Argued January 13, 2000—Decided May 23, 2000.

Before Posner, *Chief Judge*, and Bauer and Rovner, *Circuit Judges*.

Bauer, *Circuit Judge*.

This is a consolidated direct appeal by three defendants convicted of various offenses stemming from a crack cocaine conspiracy. The defendants raise numerous issues on appeal. For the reasons stated below, we affirm in part and reverse in part.

I. Background.

From approximately 1983 to 1997, Michael Mason led a conspiracy to distribute powder cocaine and crack cocaine in the Gary, Indiana area. On July 17, 1997, a federal grand jury returned an eight-count indictment for conspiracy to possess with intent to distribute cocaine and cocaine base and related offenses against Mason, Jacoby Walker, and Eric Frazier.[1] They all pled not guilty. On November 20, 1997, a third superseding indictment was returned charging Mason with ten counts, Walker with seven counts and Frazier with six counts.[2]

After the superseding indictment, Frazier tendered his plea of guilty on January 6, 1998. The plea agreement provided that in return for his cooperation, the government would file a 5K1.1 departure motion for substantial assistance, a 15 year cap on his sentence and the dismissal of the other charges. On January 27, 1998, Frazier testified for the government against Mason and Walker. On April 17, 1998, the government filed a notice of its intention not to file the 5K1.1 motion and instead requested an enhancement for perjury and that Frazier not be granted acceptance of responsibility. Frazier objected and filed a motion to compel the government to file the 5K1.1 motion and an alternate motion to withdraw his guilty plea. Proceedings were held and the district court denied both motions. The court relieved the government from its duty to file the 5K1.1 motion and sentenced Frazier to life imprisonment. The court enhanced Frazier's sentence for obstruction of justice, pursuant to the

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[1] Shannon Hemphill and Marlon Phillips were also charged in the indictment; both pled guilty and testified for the government.

[2] Hemphill, Ramone Hemphill, and Mason's girlfriend, Monique Linear, were also charged in this indictment.

Sentencing Guidelines section 3C1.1 and found that he had not accepted responsibility for the crime.

Mason and Walker went to trial.[3] On January 30, 1998, after a five day jury trial, both Mason and Walker were found guilty on all counts. On March 12, 1999, the district court dismissed one of the firearms counts against both Mason and Walker and entered judgment on the verdicts.

Walker was sentenced to life imprisonment under 21 U.S.C. §§ 841(a)(1) (distribution of crack cocaine), 846 (conspiracy to possess with intent to distribute crack cocaine) and 861(a)(1) (use of a minor to distribute crack cocaine). This sentence was to run concurrently with a ten-year sentence under 26 U.S.C. § 5861(d) for possessing an unregistered firearm. Additionally, the court imposed a thirty-year sentence to run consecutively for carrying a silencer-equipped gun "during and in relation to" the charged drug conspiracy under 21 U.S.C. § 841(c)(1).

The court arrived at that sentence after imposing a two-level enhancement for obstruction of justice under U.S.S.G. § 2D1.1 and a three-level enhancement for an aggravating role as a manager or supervisor of criminal activity under U.S.S.G. § 3B1.1(b). This raised Walker's base offense level from thirty-eight to an adjusted offense level of forty-three, which combined with a criminal history category of III, required a life sentence under the Guidelines.

Mason's base offense level was thirty-eight, reflecting the total quantity of drugs involved in the conspiracy. The court then added a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1 and an additional four-level enhancement for his role as an organizer or leader of the

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[3] Monique Linear was also a defendant in this trial.

conspiracy. A total offense level of forty-six, combined with a criminal history category of I, called for a life sentence plus the thirty years to run consecutively for carrying a silencer-equipped gun "during and in relation to" the charged drug conspiracy under 21 U.S.C. § 841(c)(1).

Mason and Walker raise several arguments on appeal. First, they argue that their convictions were based on improperly admitted hearsay testimony and evidence regarding the activities of John Allen and his organization. The government presented evidence that established that since 1996, John Allen supplied cocaine to Mason. Allen, who owned Elite Electronics[4] which supplied and serviced pagers, also provided Mason's organization with pagers. The pagers allowed callers to leave messages that would be sent by a computer at Elite Electronics to the customer's pager. Mason's girlfriend, Monica Linear, worked at Elite for several months transmitting messages to the pagers. Runners for Allen, Samuel Johnson and Anthony Franklin, delivered cocaine to Mason at either the Stony Island car lot operated by Mason or his house. Occasionally, Allen gave cocaine to Mason on credit.

Second, Mason and Walker argue insufficiency of the evidence with regard to the carrying of a pistol with a silencer during the commission of a drug transaction. Several witnesses testified to the use of guns in collection of drug debts including Frazier's testimony of hitting Little Vic with a gun and pulling a gun on Courtney Johnson. Ronald Radford, a former employee of the car lot and security guard, testified to purchasing guns for Mason and his organization.

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[4] Elite was originally located in Hammond, Indiana but the business relocated to Merrillville, Indiana and became known as Elite Wireless.

After Mason's arrest Joe Torrence, a seventeen year old, hid the silencer in his dryer in the basement of his home at 26th and Tyler. Frazier then brought him an ounce of cocaine, which he put in the dryer and removed the silencer to his room where it remained until the Gary Police confiscated it a month later. The .22 caliber Colt semi-automatic was sent to the ATF laboratory. The silencer was found to be effective as a silencer as defined by federal statute. It was not registered.

Finally, Mason and Walker raise several arguments on the calculation of their sentences. Specifically that the court improperly enhanced their sentences for obstruction of justice. Walker also argues that the court incorrectly enhanced his sentence for finding that he was a manager/supervisor in the organization and that the court miscalculated his criminal history category.

Frazier appeals the district court's denial of his motion to compel the government to file a 5K1.1 departure motion for substantial assistance per his plea agreement. Frazier's plea agreement provided that, in exchange for his cooperation, the government would file a § 5K1.1 departure motion and that the parties would agree to a sentencing cap of fifteen years. The plea agreement further provided:

> ii. I further understand that this sentencing agreement is based on my continuing cooperation with the United States and my agreement to always provide truthful and complete information and testimony; I also understand that if I fail to provide complete, truthful and candid information and testimony as required by this plea agreement, the government will not be obligated to file the departure motion and I will not be allowed to withdraw my guilty plea; I further understand that the Court can then sentence

me to any term of imprisonment with the applicable guideline range.

At the plea hearing the court discussed the agreement with Frazier, at which time the court inquired into his knowledge and understanding of the agreement. Including the following question and answer:

> The Court: Has anybody, including your lawyer, any lawyer for the government, any government agent or anybody else made any other or different promise or assurance to you of any kind in an effort to cause you to plead guilty to this crime of drug conspiracy that you're about to plead guilty to?
>
> A: No, sir.

On January 27, 1998, Frazier then testified as a government witness. On April 17, 1998, the government filed a notice to disavow its obligation to file the 5K1.1 motion, requesting an enhancement for perjury and denial of acceptance of responsibility. Frazier objected and urged the government to file a sentencing memorandum noting the alleged perjury, which the government did on November 10, 1999. Frazier moved to strike the memorandum due to tardiness or in the alternative for a continuance. On November 12, 1999 the court granted the motion to strike but allowed the government to refile which it did the next day. The memorandum alleged perjury, specifically regarding Frazier's statement that he could get probation or immunity through his cooperation. Frazier then filed a motion to compel the government to file a § 5K1.1 motion and an alternate motion to withdraw his guilty plea. On January 6, 1999, a sentencing hearing was held.

During the hearing, the government introduced a document attached to Mason's motion for new trial ("Mason Document"), which was signed by Frazier. It was not signed under oath. In the document Frazier recanted his trial testimony, claiming he lied about the defendants because of the government's promise of leniency. At the sentencing hearing, Frazier claimed those statements were false. The judge made Frazier go through it paragraph by paragraph stating whether or not they were true or false.

The district court then denied Frazier's motion stating:

> There is no doubt in this court's mind that this defendant did not live up to his end of the bargain that he made with the government. The testimony at trial that he has made promises other than what he told me the promises were when I took his plea, that in itself is sufficient to allow the government not to file it.
>
> Therefore, the court will not compel the government to file the 5K1.1 motion.
>
> The document that was submitted by Defendant Michael Mason, which is signed by the defendant, it may not be under oath, but it certainly is false representations to this court that certainly are material to the sentencing of Michael Mason, and certain portions of it he's admitted are false.
>
> That in itself coupled with the other instance of what this court determines to be perjury in his testimony when he said that--at trial when he said that there were other promises made by the government, that coupled with this false representation amounts to obstruction of justice.

The alternative request to withdraw his plea was also denied and Frazier was sentenced to life imprisonment.

II. Analysis

A. Evidentiary Issues

Mason and Walker contend that the district court made repeated and prejudicial evidentiary rulings denying them a fair trial. Both argue that the court improperly admitted the hearsay testimony of Frazier pertaining to the operation of a crack house by Walker. Further, they contend that the court improperly admitted evidence concerning the activities of John Allen, which they claim was a separate conspiracy.

Decisions to admit evidence are reviewed for abuse of discretion. *United States v. Dominguez,* 992 F.2d 678, 680-681 (7th Cir. 1993).

The district court did not abuse its discretion, despite Mason and Walker's attempt to separate the Mason and Allen organizations, when it admitted the statements of members of the Allen organization. Because there were two different organizations, Mason and Walker argue there were two different conspiracies involved. The evidence regarding the Allen conspiracy, according to them, should not have been presented to the jury. The government, on the other hand, submits that Allen and Mason's organizations were part of the same conspiracy. The evidence presented at trial clearly linked these two organizations in a single conspiracy.

"Evidence of frequent and repeated transactions, especially when credit arrangements are made, can support a conspiracy conviction." *United States v. Plescia,* 48 F.3d 1452, 1460 (7th Cir. 1995). We have held that an ongoing relationship involving

numerous purchases and the fronting of drugs indicates the existence of a conspiracy. *United States v. Ferguson,* 35 F.3d 327, 331 (7th Cir. 1994); *United States v. Lechuga,* 994 F.2d 346, 350 (7th Cir. 1993).

The government presented sufficient evidence to establish that Allen and Mason's organizations were linked and part of a single conspiracy. Beginning in 1996 until Mason's arrest in March 1997, Allen was Mason's source for drugs. Allen and his runners made frequent deliveries of large quantities of cocaine, usually two to six kilograms, to Mason. Occasionally, Allen would front the drugs to Mason. Allen's business, Elite Electronics, also supplied and serviced pagers for Mason's organization. And for a period of time, Elite employed Mason's girlfriend to transmit messages to the pagers. On March 14 DEA agents raided Greg Jones' condominium, who stored cocaine for Allen. The agents confiscated 31 kilograms of cocaine but let Jones leave. After the raid, Allen and Mason met on more than one occasion to determine how to handle Jones, concerned that he would cooperate with the authorities.

Because the statements by members of the Allen organization were made during and in furtherance of the conspiracy they were properly admitted pursuant to FRE 801(d)(2)(E). Coconspirators do not have to have contact with, or even know, all of the other conspirators. *United States v. Goines,* 988 F.2d 750, 759 (7th Cir. 1993) (quoting *United States v. Marshall,* 985 F.2d 901, 905 (7th Cir. 1993) (citation omitted)). Therefore, the fact that Allen's runners and Mason's employees did not know each other does not negate a single conspiracy.

Mason and Walker next argue that the court should have barred Frazier's hearsay testimony regarding his knowledge of the crack houses. The government concedes that the statements were erroneously admitted, but argues that any error was

harmless because the evidence against Walker was so overwhelming. The evidence included tape recordings and surveillance of Walker selling crack to the informant on two different occasions. Marlon Phillips testified that for one of those sales he provided the crack for Walker. Further, several other coconspirators identified Walker as their source for crack. Before Shannon Hemphill was allowed to sell drugs alone, Walker had to accompany him. Hemphill often delivered four and one half ounces of crack from Mason or Walker to others. Frazier's other testimony also implicated Walker's involvement in the conspiracy.

The evidence presented showed that members of Allen's organization delivered large quantities of cocaine to Mason. Testimony from several of Mason's people, including Frazier, Hemphill, and Marlon Phillips stated they received and sold cocaine for him. Further, the hearsay statements did not directly implicate Mason.

Beyond the hearsay, there was more than ample evidence in the record to support the convictions of Mason and Walker, and thus its admission was harmless. The limited prejudicial effect of the admission of the hearsay was outweighed by the cumulative effect of the other evidence already presented. *United States v. Johnson,* 127 F.3d 625, 631 (7th Cir. 1997); see *United States v. Brown,* 31 F.3d 484, 491 (7th Cir. 1994); *United States v. Carter,* 720 F.2d 941, 948 (7th Cir. 1983). Mason and Walker were not prejudiced by the court's error.

B. Sufficiency of Evidence

Mason and Walker contend that the evidence was insufficient to support their convictions under 18 U.S.C. § 924(c) with respect to carrying a .22 caliber pistol with a silencer during a drug trafficking crime, specifically, the use of the pistol by

Joseph Torrence when he received a quantity of crack from Frazier. The charge was based on coconspirator liability under the *Pinkerton* Doctrine.

Under *Pinkerton*, a coconspirator may be held criminally liable for the foreseeable overt acts of others in furtherance of a conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946); *United States v. Pazos*, 993 F.2d 136, 141 (7th Cir. 1993).

Sufficiency of the evidence challenges face nearly insurmountable hurdles, and in making this argument, Mason and Walker bear a heavy burden. *United States v. Runnels*, 93 F.3d 390, 394 (7th Cir. 1996); See *United States v. Hickok*, 77 F.3d 992 (7th Cir. 1996). We consider the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor. *Id.*; *United States v. Strang*, 80 F.3d 1214, 1219 (7th Cir. 1996).

The evidence at trial sufficiently established that a firearm was carried in furtherance of the drug conspiracy and in fact was an integral part of the conspiracy. Mason bragged to Hemphill about having the .22 caliber pistol with silencer. He offered it to John Allen's brother on the condition that it be returned. The pistol was passed among members of the organizations and used in retaliation against a person who had attacked one of the coconspirators. Frazier hit Little Vic with a firearm because of a drug debt. Moreover, the specific charge was directly related to the conspiracy and possession with intent to distribute cocaine. The evidence presented showed that Torrence, at the direction of the other coconspirators, held the firearm and a quantity of cocaine together. For these reasons, the district court properly found that sufficient evidence existed to support Mason and Walker's convictions for carrying a weapon during the commission of a crime.

C. Sentencing

1. Mason and Walker contend that the district court erred in enhancing their sentence under § 3C1.1 for obstruction of justice. The sentencing court's determination that the defendant obstructed justice is a finding of fact and is reviewed under the clearly erroneous standard on appeal. *United States v. Brown*, 900 F.2d 1098, 1101 (7th Cir. 1990). Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Id.* Section 3C1.1 of the Sentencing Guidelines provides in pertinent part:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, . . . increase the offense level by 2 levels.

And the application notes further explain that:

> 4. The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:
>
> (b) committing, suborning, or attempting to suborn perjury;
>
> 6. "Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.

USSG § 3C1.1.

The Supreme Court in *United States v. Dunnigan*, 507 U.S. 87, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993), addressed the

constitutionality of obstruction of justice enhancements and held that the district court must make independent findings of fact that the defendant lied. We have upheld an obstruction of justice enhancement where the district judge evaluated the testimony of the defendant against the testimony of others and determined that the defendant's testimony lacked credibility. *United States v. Pedigo,* 12 F.3d 618, 629 (7th Cir. 1993).

At the suppression hearing both Mason and Walker testified that they invoked their right to counsel and asked for an attorney. The interviewing agents, however, testified that each defendant signed written waivers of their right to remain silent after being fully advised of their rights. After listening to the testimony, the district court found that Mason and Walker lied under oath. Therefore, the obstruction of justice enhancement was not clearly erroneous. The district court believed the agents and determined that both Mason and Walker had lied under oath and therefore an obstruction of justice enhancement was properly made.

2. Walker argues that the district court erred in finding that he was a manager/supervisor under § 3B1.1(a), which resulted in a three-level increase to his base offense level. "A sentencing court's determination concerning a defendant's role in the offense is a finding of fact, subject to a clearly erroneous standard of review on appeal." *United States v. Brown,* 900 F.2d 1098, 1101 (7th Cir. 1990). A finding of fact will only be found erroneous if after reviewing all the evidence, the court is left "with a definite and firm conviction that a mistake has been committed." *United States v. Herrera,* 878 F.2d 997, 1000 (7th Cir. 1989). The district court must find that the evidence established the defendant's role by a preponderance of the evidence. *United States v. Spillman,* 924 F.2d 721, 723 (7th Cir. 1991).

Section 3B1.1(b) of the sentencing guidelines provides that "if the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels." U.S.S.G. § 3B1.1. In making its sentencing determination, "[t]he district court must draw inferences from a variety of data, including the defendant's demeanor and information in the [presentence report], in order to reach [its] conclusion." *United States v. Brown*, 944 F.2d 1377, 1379 (7th Cir. 1991) (citation omitted). "The central purpose of § 3B1.1 is to punish a defendant for his relative responsibility within a criminal organization." *United States v. Fones*, 51 F.3d 663, 665 (7th Cir. 1995).

The evidence clearly supports the district court's finding that Walker had a high enough level of responsibility in the organization to justify the enhancement. Shannon Hemphill's testimony established that when he first began working for Mason he was accompanied by either Walker or Frazier on all runs. Marlon Phillips testified that Mason was the leader of the organization but that he only dealt with Walker or Frazier. Torrence stated that when he was arrested he had a .40 caliber semi-automatic handgun and 56 packets of crack cocaine which Walker had given him. Frazier testified that, at the time of his arrest, Torrence was working for Walker but that he also worked for others. Frazier further testified that Walker gave him the .22 semi-automatic pistol with silencer at the Stony Island car lot. Finally, Linear's testimony established that Walker operated a crack house which she learned about from Mason after the police raid. Because Mason was the leader of the organization and a coconspirator of Walker, she was in the position to obtain reliable information about the conspiracy. The district court, after listening to all of this testimony, did not err in finding Walker was a manager.

3. Walker's final argument is that the district court's calculation of his criminal history category was flawed. Walker argues that his 1992 prison sentence was not a "prior sentence" but part of the instant offense. Because Walker raises this issue for the first time on appeal, we will review it for plain error. *United States v. Goudy,* 78 F.3d 309, 315 (7th Cir. 1996). Walker must show that the error affects substantial rights. In other words, the error must have been prejudicial. *United States v. Remsza,* 77 F.3d 1039, 1044 (7th Cir. 1996). Put another way, the error "must have affected the outcome of the district court proceedings." *United States v. Olano,* 507 U.S. 725, 736-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

In *United States v. Dillon,* 905 F.2d 1034 (7th Cir. 1990), we decided that where two Guidelines ranges overlap and the sentence imposed would have been the same regardless of which range was applied, the technical dispute over which range to apply may be left unresolved. *Id.* at 1037. As long as it is reasonable to conclude that the same sentence would have been imposed regardless of the outcome of the dispute over which range to apply, we need not resolve the dispute. *Id.* at 1038.

The miscalculation of Walker's criminal history category does not survive the plain error test. While the government admits that the court miscalculated Walker's criminal history category, the sentence does not change. Because Walker's base offense level was forty-three, which carries a life sentence, the criminal history category is irrelevant. Therefore, the district court did not err in sentencing Walker.

D. Government Did Not Violate the Anti-Bribery Statute

Mason argues that his conviction should be overturned because the government violated the anti-bribery statute when

it offered leniency to a number of government witnesses. Because Mason failed to object during trial, we review for plain error. *United States v. Hardamon,* 188 F.3d 843, 848 (7th Cir. 1999).

Section 201(c)(2) of Title 18, United States Code, provides in pertinent part:

> whoever directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . . shall be fined under this title or imprisoned for not more than two years, or both.

Mason relies unsuccessfully on the tenth circuit case *United States v. Singleton,* 144 F.3d 1343 (10th Cir. 1998). In Singleton, the court found that immunity or a lower sentence given in exchange for testimony to be a "thing of value," and thus a violation of the statute. This circuit has rejected the decision in Singleton, finding that the government does not violate the statute in exchanging truthful testimony for a reduction in sentence. *Hardamon,* 188 F.3d 843, 848 (7th Cir. 1999); *United States v. Condon,* 170 F.3d 687, 689 (7th Cir. 1999); *United States v. Barrett,* 505 F.2d 1091, 1100-03 (7th Cir. 1974). Mason's reliance on Singleton is further misplaced since the Tenth Circuit sitting en banc has reconsidered its position and has vacated that opinion. *United States v. Singleton,* 165 F.3d 1297, 1298 (10th Cir. 1999). Mason has not provided us with any reason to reconsider and therefore there is no violation of the statute.

E. Jury Instruction

Mason's final argument is that the court failed to advise the jury of the necessary elements of an offense under 21 U.S.C. § 861(a)(1) of employing a minor for the purpose of distributing cocaine. Mason contends that the jury should have been instructed that he had to know Torrence was a juvenile in order to be convicted. Again this issue is being raised for the first time on appeal, so we review it for plain error. *United States v. Goudy,* 78 F.3d 309, 315 (7th Cir. 1996).

Section 861(a) of Title 21, United States Code, provides in pertinent part:

> It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally–
>
> > (1) employ, hire, use, persuade, induce, entice, or coerce, a person under eighteen years of age to violate any provision of this subchapter or subchapter II of this chapter;

Count 13 of the third superseding indictment charged Mason with violating § 861(a) in employing Torrence in the conspiracy. The evidence revealed that Torrence worked in Mason's crack houses before he reached the age of eighteen.

Other circuits have found that to require knowledge would undercut the legislative purpose. *United States v. Cook,* 76 F.3d 596, 601 (4th Cir. 1996). Further, requiring knowledge merely encourages leaders of organizations, like Mason, to blind themselves to the ages of the youths with whom they deal. *Id.* See, *e.g., United States v. Chin,* 981 F.2d 1275, 1280 (D.C. Cir. 1992); *United States v. Williams,* 922 F.2d 737, 738-39 (11th Cir. 1991); *United States v. Valencia-Roldan,* 893 F.2d 1080

(9th Cir. 1990); *United States v. Carter*, 854 F.2d 1102, 1108-09 (8th Cir. 1988). *Williams* explained that the government need only prove that the defendant knowingly employed a person in the commission of a drug offense and that the person employed was under eighteen when employed. *Williams*, at 739.

The court in *Chin* found it impossible that Congress would place the burden, beyond a reasonable doubt, on the government to prove that the drug dealer had known the youth he enticed was under eighteen. *Chin*, at 1280. The intent of Congress in § 861(a) was to protect juveniles indicating an intent to place the burden on the drug dealer to know who is working for him. *Id.* We join the other circuits in finding that knowledge is not an element of § 861(a) and therefore Mason's argument fails.

F. Frazier's Plea

Frazier argues that the court improperly denied his motion to compel the government to file a § 5K1.1 departure motion for substantial assistance or in the alternative to withdraw his plea. The government refused to file the § 5K1.1 departure motion on the grounds that Frazier lied on the stand regarding his deal with the government during Mason and Walker's trial. The government argues that this lie constituted a material breach of the plea agreement and therefore it was relieved of any obligation to file the motion. The district court found that Frazier did not live up to his end of the bargain and denied both of his motions.

Plea agreements are contracts and thus subject to contract law. *United States v. Lezine*, 166 F.3d 895, 901 (7th Cir. 1999). The government cannot unilaterally determine that the defendant has breached the plea agreement and refuse to uphold its end of the bargain. *Id.* An evidentiary hearing is required for

the court to determine if a substantial breach of the plea agreement has occurred. *Id.* Because plea agreements are considered contracts, a breach must be proven by a preponderance of the evidence. *United States v. Ataya,* 864 F.2d 1324, 1337 (7th Cir. 1988); *United States v. Verrusio,* 803 F.2d 885 (7th Cir. 1986).

In this case the district court provided insufficient findings of fact to support its determination that Frazier substantially breached the plea agreement. The district court simply stated that "there was no doubt in his mind that Frazier did not live up to his end of the bargain." The court did not elaborate or provide sufficient findings for its reasoning, therefore we remand for a more complete explanation of the what facts the court found that led to his conclusion that Frazier "did not live up to his end of the bargain."

In all other respects, the decisions of the district court are affirmed. The case is remanded for the sole purpose of addressing the issues relating to Frazier's breach of the plea bargain.

Affirmed in part and reversed in part.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 99-1441, 99-1654 & 99-1720

JUDGMENT - WITH ORAL ARGUMENT

May 23, 2000

United States of America, Plaintiff-Appellee,

v.

Eric L. Frazier, Jacoby Walker & Michael Mason,
Defendants-Appellants

Appeals from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. 97 CR 88, James T. Moody, *Judge*

Before

Honorable Richard A. Posner, Chief Judge
Honorable William J. Bauer, Circuit Judge
Honorable Ilana Diamond Rovner, Circuit Judge

The judgments of the District Court are AFFIRMED. The case is REMANDED for the sole purpose of addressing the issues relating to Frazier's breach of the plea bargain. The

above is in accordance with the decision of this court entered on this date.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-1654

United States of America, Plaintiff-Appellee,

v.

Jacoby Walker, Defendant-Appellant

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. 2:97-CR-88 James T. Moody, *Judge*

Before

Honorable Richard A. Posner, Chief Judge
Honorable William J. Bauer, Circuit Judge
Honorable Ilana Diamond Rovner, Circuit Judge

June 30, 2000

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-entitled cause by defendant-appellant Jacoby Walker, no judge in active service

has requested a vote thereon,* and all of the judges on the original panel have voted to deny rehearing.

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* The Honorable Joel M. Flaum took no part in consideration of this petition.

U.S.S.G. § 3C1.1

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

Application Notes:

* * *

2. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

3. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the

conduct to which this adjustment applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.

4. The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

(a) threatening, intimidating, or otherwise unlawfully influencing a co- defendant, witness, or juror, directly or indirectly, or attempting to do so;

(b) committing, suborning, or attempting to suborn perjury;

(c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate;

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(i) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (*e.g.*, 18 U.S.C. §§ 1510, 1511).

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

* * *

6. "Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.